NURHASAN JUKASAN A

v.

PP & ANOTHER APPEAL

COURT OF APPEAL, KOTA KINABALU B
TENGKU BAHARUDIN SHAH JCA
JEFFREY TAN JCA
T SELVENTHIRANATHAN JCA
[CRIMINAL APPEAL NOS: S-05-110-2004 & S-05-111-2004]
10 MARCH 2010 C

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Misdirection by trial judge - Trial judge offended double presumption rule - No direct finding by trial judge of possession yet presumption of trafficking invoked - Whether there was failure of justice or miscarriage of justice* D

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Statutory presumption - Trafficking - Word "includes" in s. 2 did not exclude the doing of other acts - Packing of proscribed drugs an act of trafficking - Direct evidence of trafficking - Whether presumption of trafficking unnecessarily invoked* E

On 5 September 2002, a police party led by Assistant Superintendent of Police Ahmad Kamaruddin Abdullah ('PW2') was outside an unnumbered house ('house') at Kampong Bakau Sentosa Jaya Squatter, 3 1/2 milestone, in the District of Sandakan, in the State F of Sabah to conduct a raid of the house. Upon kicking open the door of the house which was locked, both appellants were found sitting on the floor of an empty room facing each other and packing drugs. The appellants were the only persons in that room and there was nobody else in the house. Both appellants attempted G to flee but were detained after a struggle. PW2 recovered an open box and a small red bag containing clear plastic packets of a crystalline substance. PW2 also recovered a small brown sling bag containing a small grey bag, a small black bag, and two envelopes. The grey bag, black bag and two envelopes also contained clear H plastic packets of a crystalline substance. Upon analysis, those plastic packets were found to contain methamphetamine. At the close of the prosecution case, the trial judge held that a *prima facie* case had been made out. The appellants testified that they tried to escape as they had no legal documents with them. At the end of I

A the entire case, the trial judge held that the appellants were in physical custody or control of the drugs recovered from the house, that the knowledge of the appellants of the drugs in their custody or control could be inferred from the fact that the appellants were found packing drugs and that both had tried to flee when the police
B raided the house, that the appellants had not rebutted the presumption of trafficking, and that the appellants had not cast any doubt on their guilt. The appellants appealed to the Court of Appeal against conviction and sentence.

C **Held (dismissing the appeal and affirming conviction and sentence)**
Per Jeffrey Tan JCA delivering the judgment of the court:

(1) The trial judge had offended the double presumption rule. There was no direct finding of possession, yet the presumption
D of trafficking was invoked. An appeal should not succeed on misdirection alone. There is no miscarriage or failure of justice where there is sufficient evidence to warrant the conviction. The trial judge's misdirection had not occasioned any injustice. There was direct evidence of trafficking here. The packing of
E proscribed drugs, is clearly an act of trafficking envisaged by s. 2 of the Dangerous Drugs Act 1952. As there was direct evidence of trafficking, the presumption of trafficking was unnecessarily invoked. *Lorensus Tukan v. PP* (foll); *Tunde Apatira & Ors v. PP* (foll). (paras 11-19)
F

(2) The appellants' story that they fled because they had "no papers" was incompatible with the evidence. As the appellants were packing drugs when the police burst into the room and they immediately fled, it was entirely legitimate for the trial
G judge to infer that the appellants fled to elude arrest for their nefarious activity, and reject the appellants' version. The learned trial judge was also justified in disbelieving the defence. It was unchallenged evidence that the appellants were packing drugs and that effectively negated the appellants' defence that they
H were innocent bystanders. (para 22)

(3) The appellants had actual physical possession of the drugs they were packing. They also had custody or control or possession of the other drugs in the room. Since there was direct evidence of
I a trafficking activity, it could be presumed that they had

possession of all the other drugs in the room without contravening the double presumption rule. With proof of possession and trafficking, all ingredients of the offence had been made out against each appellant. The defence could not have cast any reasonable doubt on the guilt of the appellants. Conviction was the correct verdict. Accordingly the court dismissed the appeal and affirmed the conviction and sentence. (paras 23 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Pada 5 September 2002, sepasukan polis yang diketuai oleh Penolong Penguasa Polis Ahmad Kamaruddin Abdullah ('SP2') berada di luar sebuah rumah tidak bernombor ('rumah') di Kampong Setinggan Bakau Sentosa Jaya, Batu 3 1/2, dalam Daerah Sandakan, dalam Negeri Sabah bagi melakukan serang hendap terhadap rumah. Selepas menendang pintu rumah yang berkunci, kedua-dua perayu dilihat sedang duduk berhadapan satu sama lain di atas lantai sebuah bilik kosong sambil membungkus dadah. Hanya perayu-perayu berada dalam bilik tersebut dan tiada orang lain berada di dalam rumah. Kedua-dua perayu cuba melarikan diri, namun berjaya ditangkap selepas satu pergelutan. SP2 menjumpai satu kotak terbuka dan satu beg merah kecil yang mengandungi paket-paket plastik yang jelas dan berkristal. SP2 juga menjumpai di dalam rumah sebuah beg sling kecil coklat yang mengandungi satu beg kecil kelabu, satu beg kecil hitam dan dua sampul. Beg kelabu, beg hitam dan dua sampul tersebut didapati mengandungi benda berkristal. Semasa di analisa, paket-paket plastik didapati mengandungi methamphetamine. Di akhir kes pendakwaan, hakim bicara memutuskan bahawa suatu kes *prima facie* telah berjaya dibuktikan. Dalam keterangan, perayu-perayu berkata bahawa mereka cuba melepaskan diri kerana tidak memiliki apa-apa dokumen pengenalan diri. Di akhir keseluruhan kes, hakim bicara mendapati bahawa perayu-perayu mempunyai jagaan fizikal atau kawalan terhadap dadah yang dijumpai dari rumah, bahawa pengetahuan perayu-perayu terhadap dadah yang berada dalam jagaan atau kawalan mereka boleh diandaikan dari fakta bahawa perayu-perayu didapati membungkus dadah dan cuba melarikan diri bila polis menyerbu rumah, bahawa perayu-perayu gagal menyangkal anggapan mengedar, dan bahawa perayu-perayu gagal membangkitkan sebarang keraguan terhadap kebersalahan mereka. Perayu-perayu merayu ke Mahkamah Rayuan terhadap sabitan dan hukuman.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)
Oleh Jeffrey Tan HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah melanggari kaedah anggapan berganda. Anggapan pengedaran telah digunapakai walaupun tidak wujud dapatan milikan secara terus. Sebuah rayuan tidak boleh berjaya semata-mata atas alasan salah arahan. Tidak wujud salahbawa atau kegagalan keadilan di mana terdapat keterangan yang cukup untuk mengasaskan sabitan. Salah arahan hakim bicara tidak membawa kepada sebarang ketidakadilan. Terdapat keterangan terus mengenai pengedaran di sini. Pembungkusan dadah-dadah terlarang adalah jelas suatu perbuatan yang dibayangkan oleh s. 2 Akta Dadah Berbahaya 1952. Oleh kerana terdapat keterangan terus mengenai pengedaran, anggapan pengedaran telah dipakai secara yang tidak perlu. *Lorensus Tukan v. PP* (diikuti); *Tunde Apatira & Ors v. PP* (diikuti).

(2) Cerita perayu-perayu bahawa mereka melarikan diri kerana tidak mempunyai "pengenalan diri" adalah bercanggah dengan keterangan. Memandangkan perayu-perayu sedang membungkus dadah semasa polis menerjah ke dalam bilik, dan kemudian terus melarikan diri, maka tidaklah salah untuk hakim bicara mengandaikan bahawa perayu-perayu lari kerana hendak mengelak dari ditangkap atas aktiviti buruknya. Yang arif hakim bicara juga berjustifikasi untuk tidak mempercayai pembelaan. Adalah satu keterangan yang tidak dicabar bahawa perayu-perayu sedang membungkus dadah dan itu secara berkesannya telah menyangkal pembelaan perayu-perayu bahawa mereka adalah 'innocent bystanders'.

(3) Perayu-perayu mempunyai milikan fizikal dadah-dadah yang mereka bungkus. Mereka juga mempunyai jagaan atau kawalan atau milikan dadah-dadah lain di dalam bilik. Oleh kerana terdapat keterangan terus aktiviti pengedaran, anggapan boleh dibuat bahawa mereka mempunyai milikan kesemua dadah-dadah di dalam bilik tanpa melanggari kaedah anggapan berganda. Dengan adanya bukti milikan dan pengedaran, semua ingredien kesalahan telah dibuktikan terhadap setiap perayu. Pembelaan ternyata gagal membangkitkan keraguan munasabah terhadap kebersalahan perayu-perayu. Sabitan adalah satu keputusan yang betul dan mahkamah dengan itu menolak rayuan dan mengesahkan sabitan dan hukuman.

Case(s) referred to:
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Chu Tak Fai v. PP [2006] 4 CLJ 931 FC ***(refd)***
Gunalan Ramachandran v. PP [2004] 4 CLJ 551 CA ***(dist)***
Gunalan Ramachandran & Ors v. PP [2006] 1 CLJ 857 FC ***(refd)***
Elahee Buksh 5 Suth WR 80
Haryadi Dadeh v. PP [2000] 3 CLJ 553 FC ***(refd)***
Johar Mustapha v. PP [2009] 6 CLJ 193 FC ***(refd)***
Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC ***(foll)***
Mohd Haikal Mohd Khatib Saddaly & Ors v. PP [2009] 1 LNS 292 CA
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843 CA ***(refd)***
PP v. Karim AB Jabar [2008] 5 CLJ 173 CA ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
PP v. Tan Tatt Eek and Other Appeals [2005] 1 CLJ 713 CA ***(refd)***
Teng Howe Sing v. PP [2009] 3 CLJ 733 FC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 60(1), 92
Criminal Procedure Code, s. 422(c)
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), (j)
Evidence Act 1950, s. 167

Other source(s) referred to:
Sarkar on Criminal Procedure, 7th edn, p 1367

For the 1st appellant - Ram Singh Harbans; M/s Ram Singh Harbans & Co
For the 2nd appellant - Serena Liew Chun Yean; M/s Serena Liew & Assocs
For the respondent - Tengku Amir Zaki Tengku Hj Abdul Rahman; AG's Chambers

Reported by Susheila Sreedharan

JUDGMENT

Jeffrey Tan JCA:

[1] This is an appeal by 2 co-accused (appellants) against conviction and sentence for the offence of trafficking in a dangerous drug (87.93 grammes of methamphetamine) at about 5.30am on 5 September 2002, at an unnumbered house (house) at Kampong Bakau Sentosa Jaya Squatter, 3 ½ milestone, in the District of Sandakan, in the State of Sabah.

[2] The prosecution evidence could be summarised as follows. At about 5.30am on 5 September 2002, a police party led by Assistant Superintendent of Police Ahmad Kamaruddin bin Abdullah (PW2) was outside the house to conduct a raid of the house. The door of the house was locked. PW2 kicked open the door. Thereupon, Sergeant Khairon (PW3) rushed inside the house, followed by PW2 and the rest of the police party. Both appellants were sitting on the floor of an empty room (for the condition of that room, see photographs P17n(a) and P17n(b)), facing each other and packing drugs (see p. 73 of the appeal record – AR). The appellants were the only persons in that room. There were no other persons in that house. Both appellants attempted to flee. The 1st appellant managed to climb half way out of the window. The 2nd appellant ran towards the window and then turned towards the door. Both appellants were apprehended after a struggle. From the floor, in the middle of the room, PW2 recovered an open box that contained 8 clear plastic packets of a crystalline substance and a small red bag that contained 6 clear plastic packets of a crystalline substance (see 44AR). From the floor, next to the wall of the room, PW2 recovered a small brown sling bag (see 44AR). That sling bag contained a small grey bag, a small black bag, and two envelopes. That grey bag contained 8 clear plastic packets of a crystalline substance. That black bag contained 6 clear plastic packets of a crystalline substance. Those 2 envelopes contained 11 clear plastic packets of a crystalline substance. Apart from those things, the sling bag also contained 2 small weighing scales in a small clear plastic box, a roll of clear plastic, and a pair of scissors (see 45AR). Upon analysis, it was found that those plastic packets contained 87.93 grammes of methamphetamine.

[3] At the close of the prosecution case, the learned trial judge held that a *prima facie* case had been made out.

[4] The testimony of the 1st appellant went along the following lines. Early in the morning of 5 September 2002, he followed one Ins to the house. The house belonged to Ins. Before he entered the house, he saw one Alamin who held a torch and who appeared to be guarding the house. Inside the house, he saw the brown bag next to Ins. He had no knowledge of the contents in that brown bag. Other than innocuous items, he did not see anything else, as the room was lit by just one candle. Ins offered him "medicine", which was "syabu", as he had complained of a headache. Soon after that,

Ins asked him to open the house door for the 2nd appellant. A short while later, that is, after the 2nd appellant had entered the house, the door was kicked open, as he was smoking "syabu". A police party rushed into the room. Ins kicked away the pistol held by a police officer and then jumped out of the window. He (1st appellant) also tried to escape, as he had no legal documents with him. He failed in his attempt. He was arrested. At the police station, he was shown a passport-size photograph taken from the brown bag. He told the police that person in that photograph was Ins. He also told the police that the house and brown bag belonged to Ins.

[5] The 2nd appellant gave the following version of the incident. He was looking for his brother-in-law, one Nasir, to take him to work. He could not find Nasir. Instead, he was invited into the house by the 1st appellant to have coffee. Whilst he was inside, the police raided the house. He was frightened, as he had no "document diri" with him. He did not resist arrest. He had no knowledge of the drugs recovered from the house. Apart from his oral testimony, the 2nd appellant also produced his caution statement in which he related that he was in that house looking for Nasir, and that he attempted to flee when the police raided the house as he had no "documen" (see 312AR).

[6] At the end of the entire case, the learned trial judge held that the appellants were in physical custody or control of the drugs recovered from the house (see 315AR), that the knowledge of the appellants of the drugs in their custody or control could be inferred from the fact that the appellants were found packing drugs (see 316AR) and from the further fact that both appellants had tried to flee when the police raided the house (see 316AR), that the appellants had not rebutted the presumption of trafficking (see 327AR), and that the appellants had not cast any doubt on their guilt.

[7] In his written submission, Mr Ram Singh Harbans for the 1st appellant submitted to the following effect. On the evidence, the appellants were not in actual possession of the drugs recovered from near the wall; the appellants were only in possession of the drugs (exhs. 1 and 2, weighing 5.13 grammes) that they were packing in the middle of the room. In *Chan Pean Leon v. PP* [1956] 1 LNS 17, it was held that to prove possession, the prosecution must prove

A both the physical and mental element. The appellants were sitting in front of each other and packing drugs. Packing does not fall within the definition of trafficking. There was no evidence that the house belonged to the appellants. There were no documents or things inside the house to prove that the appellants had exclusive
B rights over the house. It could not be inferred that the house belonged to the appellants. It was wrong to infer that the appellants had knowledge of the drugs. The prosecution had not established the identity of the occupiers of the house or room. It was wrong to find common intention.

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[8] In his oral submission, Mr. Ram Singh repeated that the appellants were only in possession of exhs. 1 and 2. Apart from that already raised in his written submission, learned counsel also orally submitted as follows. The appellants had no knowledge of the drugs
D in the sling bag. There was no evidence that the sling bag was opened in the presence of the appellants. Inside the sling bag was the photograph of Ins. There was evidence (from the 1st appellant) of the photograph of Ins. Fingerprints were not lifted from the packets of drugs found in the sling bag. The appellants were not in
E physical possession of the sling bag and drugs.

[9] Miss Serena Liew Chun Yean for the 2nd appellant submitted as follows. The learned trial judge relied on the case of *Gunalan a/l Ramachandran v. PP* [2004] 4 CLJ 551 which had been reversed
F by the Federal Court. The defence story of the photograph of Ins was put to PW2 (see 62AR). Section 2 of the Dangerous Drugs Act 1952 (DDA) requires possession in the first place.

[10] The learned Deputy Public Prosecutor, Tengku Amir Zaki bin Tengku Hj Abdul Rahman, replied that the learned trial judge relied
G on direct evidence of possession and on the presumption of trafficking under s. 37(da) of the DDA. When asked by my learned brother T Selventhiranathan JCA on "the things near the wall", learned DPP submitted that the room was locked from inside, that both appellants tried to run away, that it was a small room, about
H 10' by 10', that both appellants were seated in the middle of that small room, that the appellants were close to the sling bag, and that the drugs in question were similar. Learned DPP further submitted that the appellants had failed to give an explanation when they were arrested, that the explanation only came about at the defence stage

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(learned DPP cited *Teng Howe Sing v. PP* [2009] 3 CLJ 733, where it was held by the Federal Court per Zulkefli Makinudin FCJ that the appellant's failure to provide relevant information entitled the trial judge to disbelieve him), that there was possession of all the drugs, that both appellants were caught in the midst of preparation of drugs for sale and therefore s. 37(da) of the DDA was not needed, and that trafficking paraphernalia, namely scissors and weighing scales, were found inside the room, inside the sling bag.

[11] Somewhat to our surprise, neither learned counsel nor learned DPP noticed that the learned trial judge had offended the double presumption rule. That latter rule, as laid down by the Federal Court in *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170 and affirmed by the Federal Court in *PP v. Tan Tatt Eek and Other Appeals* [2005] 1 CLJ 713, *Haryadi Dadeh v. PP* [2000] 3 CLJ 553 and in *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129, is that there cannot be a presumption upon a presumption.

[12] It was the primary finding of the learned trial judge that the evidence of PW2 and PW3 "established the fact that the 1st and 2nd accused were in custody or control of the methamphetamines found in the house which was locked from inside" (see 315AR), and that "the 1st and 2nd accused had knowledge of the methamphetamines in their custody and control" (see 317AR). It was clearly a finding of custody or control, coupled with requisite knowledge. On the basis of that primary finding, the learned trial judge surmised, "in the circumstances I find that the prosecution has established possession beyond reasonable doubt" (see 317AR). There was no direct finding of possession, and the presumption of trafficking under s. 37(da) of the DDA could not be invoked. But yet the presumption of trafficking was clearly invoked, for it was held by the learned trial judge that the appellants had not "rebutted the presumption of trafficking" (see 327AR).

[13] Nevertheless, we are mindful that an appeal should not succeed merely on account of misdirection alone. For a start, s. 422(c) of the Criminal Procedure Code (CPC) provides that the finding, sentence or order passed by a court of competent jurisdiction shall not be reversed or altered on account of the improper admission or rejection of any evidence, "unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice". Then again, s. 167 of the Evidence Act 1950 provides that "The improper admission or

rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision". And specifically, in relation to the duties and powers of the Court of Appeal, s. 60(1) of the Courts of Judicature Act 1964 provides:

> At the hearing of an appeal the (Court of Appeal) shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the (Court of Appeal) may thereupon confirm, reverse or vary the decision of the (High Court), or may order a retrial or may remit the matter with the opinion of the (Court of Appeal) thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:
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> > Provided that the (Court of Appeal) may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[14] The duty of an appellate court in dealing with an appeal where misdirection has occurred was put by the former Supreme Court per Seah SCJ in *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162, as follows:

> Misdirection is not of itself a sufficient ground to justify interference with the verdict; the appellate court must proceed respectively to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has occasioned a failure of justice. If the court so finds, then it has a duty to interfere. In deciding whether there has been a failure of justice in consequence of a misdirection, the appellate court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent one convicted (see *Abdul Rahim v. King-Emperor* [1945-46] 73 IA 77).

[15] The following test propounded by Sir Barnes Peacock, Chief Justice of the High Court of Calcutta in *Elahee Buksh* 5 Suth. WR 80 (where the trial judge had seriously misdirected the jury) in dealing with an appeal where misdirection has occurred was adopted by the former Supreme Court in *Lorensus Tukan*:

> That the verdict and conviction ought not to be set aside if the court be of opinion that the verdict was warranted by the evidence, and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the judge with the aid of assessors, instead of by jury.

[16] The overriding concern is whether there has been a failure of justice or a miscarriage of justice (see *Lorensus Tukan*, where it was held by the former Supreme Court that the words "failure of justice" in s. 422 of the CPC should carry the same meaning as "miscarriage of justice" under the proviso to s. 60 of the Courts of Judicature Act 1964). The object of s. 422 of the CPC is to secure justice by preventing the invalidation of a trial already held on the ground of any error, omission or irregularity, unless it has occasioned a failure of justice (see *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197, per Augustine Paul FCJ quoting *Sarkar on Criminal Procedure* (7th edn) at 1367). "It is certainly the duty of the appellate court to decide whether in a particular case any error, omission or irregularity is curable under s. 422 of the CPC … the appellate court must also decide whether the misdirection in law has occasioned a failure of justice. See *PP v. Ishak bin Hj Shaari and Other Appeals* [2003] 4 MLJ 585; [2003] 5 AMR 401; [2003] 3 CLJ 843 (CA), with a coram of five judges" (*Mohd Haikal Mohd Khatib Saddaly & Ors v. PP* [2009] 1 LNS 292 per Abdul Malik Ishak JCA).

[17] There would be no miscarriage or failure of justice where there is sufficient evidence to warrant the conviction. If, but only if, the error has occasioned a failure of justice, would the Court of Appeal declare the trial a nullity by reason that the misdirection amounted to an illegality (*PP v. Ishak bin Hj Shaari & Other Appeals* [2003] 3 CLJ 843). So, in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381, the Federal Court held that where the evidence is clear and cogent, an appellate court may affirm a conviction despite a misdirection (for the record, *Tunde Apatira* was decided at first instance in 1995 before the double presumption rule had come into being in *Muhammed Hassan v. PP* [1998] 2 CLJ 170).

[18] In *Tunde Apatira*, Gopal Sri Ram JCA, as he then was, thus summed up the way in which the proviso to ss. 60 and 92 of the Courts of Judicature Act is to be applied:

> The expression 'miscarriage of justice' appears in the proviso to s. 92(1) of the Courts of Judicature Act 1964. A similar expression, 'failure of justice' appears in section 422 of the Criminal Procedure Code. They mean the same thing. For, the same result follows when justice either fails or miscarries. The proviso reads as follows:
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> > Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.
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> The way in which the proviso is to be applied has been considered in several cases. Three of these deserve mention.
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> In *Mraz v. The Queen* [1955] 93 CLR 493 at p 514, Fullagar J, when addressing a similar provision in the New South Wales Criminal Appeal Act 1912 said:
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> > It is very well established that the proviso to s. 6(1) does not mean that a convicted person, on an appeal under the act, must show that he ought not to have been convicted of anything. It ought to be read and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.
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> In *Krishna Murthy v. Abdul Subban* [1965] 1 Cr LJ 565 & p 576, Hedge J when dealing with the Indian equipollent of s. 422 of our Criminal Procedure Code said:
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> > The expression 'a failure of justice has in fact occasioned thereby' found in s. 535(1), Cr Pc does not connote that the court should be of the opinion that an innocent person has

> been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the legislature need not have introduced the conception of 'failure of justice' in ss. 535 and 537, Cr PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr PC. In law the expression 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

In *Rattan v. R* [1974] CLR 510 at p 516. However, Barwick CJ, explained the way in which the proviso is to be applied to particular circumstances. He said:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.

So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied, that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross v. PP* [1996] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265 illustrates the exception.

[19] But the aforesaid misdirection by the learned trial judge had not occasioned any injustice. To put it in a word, there was direct evidence of trafficking. The appellants were packing proscribed drugs. It was submitted that "packing any dangerous drug" is not one of the acts specified in s. 2 of the DDA. That, with respect, was a misconception of the law. Section 2 provides that "trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug". The crucial word is "includes". The definition of trafficking does not exclude the doing of other acts. And the doing of the act, the packing of proscribed drugs, is clearly an act of trafficking envisaged by s. 2. Given that there was direct evidence of trafficking, the presumption of trafficking was unnecessarily invoked.

[20] Besides direct evidence of trafficking, there was also direct evidence of possession. The appellants who were packing the drugs were in so doing in actual physical possession of those drugs. The appellants might not have been in actual physical possession of the other drugs in the room. But that is not to say that the appellants were not in possession or custody or control of those drugs. For even without actual physical custody or possession, it could still amount to possession. The drugs in *PP v. Karim AB Jabar* [2008] 5 CLJ 173 were found from the front passenger seat and in the boot of the car. At the close of the case for the prosecution, the trial judge acquitted and discharged the respondent without calling for his defence. On appeal, the Court of Appeal per Gopal Sri Ram JCA held that the proximity of the respondent to the drugs at the front passenger seat was a fact relevant to establish actual physical possession, and that given that the quantity of drugs was far in excess of that required for personal use, there ought to have been drawn from the totality of the evidence the inference that the respondent was conveying the drugs for the purpose of trafficking in it. The drugs in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 were found under the driver's seat and under the front passenger's seat of the car driven by the respondent. The respondent's defence was that although he knew the existence of the three packages in the car, which he claimed were put in the car by one Jiri, he had no knowledge that they contained drugs. The Federal Court held that

apart from the caution statement there was sufficient evidence to support the finding of the trial judge, and that on the facts and in the circumstances it ought to be the finding that the respondent had possession of the drug independent of the statutory presumption under s. 37(d) of the DDA. In *Johar bin Mustapha v. PP* [2009] 6 CLJ 193, where the drugs were in the boot of the car, the Federal Court per Alauddin PCA held that the combined effect of the conduct of the appellant in refusing all help after his car had skidded off the road, in driving away all who had come to help him in his distress, in opening the boot of the car and then throwing away the drugs to a spot near his car, in running away from the scene upon arrival of the police but before the discovery of the drugs were, in the absence of an explanation, sufficient for an affirmative finding that the appellant was in possession of the proscribed drugs. In relation to knowledge, the Federal Court in Johar Mustapha cited *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 22 MLJ 237, 239, where Thomson J, as he then was, had dealt with the issue of possession under the Common Gaming Houses Act 1953 as follows:

> 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed, p 304):
>
> > A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and mental element which must both be present before possession is made out. *The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so,* in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances.

[21] Not just knowledge but possession also could be proved by inferences drawn from the surrounding facts and circumstances. And in the instant case, the surrounding facts and circumstances were telling. There was not a stick of furniture in the room where the

A appellants were found. The only things in that room were the exhibits produced in court. That room was very small, measuring just 10' by 10'. The sling bag was next to the wall, near the window. That sling bag contained proscribed drugs. On the floor were a container and a red bag that contained similar drugs. Both
B appellants were sitting in the middle of that small room. Both appellants could not have been more than a few feet away from that sling bag next to the wall, and container and red bag in the middle of the room. The things in that room could not have escaped the attention of either appellant. Now given that there was that close
C proximity between the appellants and the proscribed drugs, that the appellants were so situated with respect to those drugs that they had the power to deal with them, the circumstances were entirely such that it could be safely inferred that the appellants had custody or control, if not possession, of all the proscribed drugs. The appellants
D were packing drugs, which was a wilful act that was not at all involuntary. The appellants must have been fully cognisant of their act. It got to be that the appellants knew they were packing proscribed drugs. Now given that the appellants were packing drugs of the only kind found in the room, and that in that room were 2
E small weighing scales, a roll of clear plastic, and a pair of scissors, which could have been the tools to weigh and pack the drugs, it would not take rocket science to figure out that the appellants must have packed all the drugs found in the room. That the appellants attempted to flee when the police burst into the room only
F confirmed that the appellants could not have been innocent.

[22] The story that the appellants took flight because they had "no papers" was totally incompatible with the evidence. It was, after all, unchallenged evidence that the appellants were packing drugs
G when the police burst into the room. Thereupon, the appellants immediately took flight. Given that that was the sequence of events, it was entirely legitimate for the learned trial judge to infer (see 317AR) that the appellants took flight to elude imminent arrest for their nefarious activity, and reject the contrary version of the
H appellants. It was also entirely legitimate for the learned trial judge to disbelieve the defence. As said hereinbefore, it was unchallenged evidence that the appellants were packing drugs. That effectively put paid to the defence that the appellants were innocent bystanders.

I

[23] The appellants could not have been innocent bystanders. Both appellants were packing drugs. They had actual physical possession of the drugs they were packing. At the same time, they had custody or control or possession of the other drugs in the room. Since there was direct evidence of a trafficking activity, it could be presumed that they had possession of all the other drugs in the room without any transgression of the double presumption rule. With proof of possession and trafficking, all ingredients of the offence had been made out against each appellant as a separate exercise. The defence could not have cast any reasonable doubt on the guilt of the appellants. Conviction was the correct verdict.

[24] With respect to the other points raised in submissions by the learned counsel, we believe we need only to give the following short rejoinder. It was submitted that there was no such evidence, but the evidence that the sling bag was opened in the presence of the appellants is at 44AR. It is true that there was no evidence that the packets of drugs were dusted for fingerprints, but the case for the prosecution was made out without fingerprint evidence (see *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233, where the Federal Court per Chong Siew Fai CJ (Sabah & Sarawak) held that there was evidence indicating the identities of the alleged offenders, and fingerprint evidence, therefore, assumed little value). It is true that the learned trial judge had relied on the Court of Appeal case of *Gunalan Ramachandran v. PP* [2004] 4 CLJ 551, and that that case was reversed by the Federal Court. But it is not true that the learned trial judge had relied on a case that had been reversed. The judgment of the learned trial judge was delivered on 30 November 2004. The judgment of the Federal Court in *Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857 was delivered on 27 January 2006. From those dates, it should be evident that the learned trial judge relied on a case that had yet not been reversed. Be that as it may, we hasten to add that *Gunalan Ramachandran* (CA) was reversed on the facts, not as to the law. *Gunalan Ramachandran* (CA) is still good law (see *Chu Tak Fai v. PP* [2006] 4 CLJ 931, where the Federal Court wholly agreed with *Gunalan Ramachandran* (CA) that the ten per centum stipulated in s. 37(j) of the DDA refers to the number of receptacles and not the total weight of the drug found or the total amount or weight of the samples taken for analysis, and that it is for the chemist to determine the sufficiency of the weight of the drug required for the analysis). The appellants were

found packing drugs in a room in which only they were present. There were no other persons in the house. Hence, the question of exclusive possession of the room or ownership of the house was not material.

[25] It was for those reasons that we had dismissed the appeal and affirmed the conviction and sentence, when we heard these appeals on 19 November 2009.